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UNITED STATES SUPREME COURT.

OCTOBER TERM A. D. 1882.—No. 148.

HENRY J. ROGERS, *Appellant*,

vs.

WILLIAM F. DURANT, *Appellee*.

Appeal from Circuit Court of the U. S. — Northern District of Illinois.

APPELLANT'S REPLY.

HENRY C. WHITNEY,
Appellant's Solicitor.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

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To the learned counsel's able and comprehensive brief, I reply:

(1) To Statement.

P. 3. The learned counsel say that the assignment to Richards, Crane & Mattox was made in *1867*, and not in *1868*. They are certainly in error; the referee in the New York suit *expressly finds, as matter of fact*, that it was in 1868. (Record, p. 200.) See also pp. 202, 218, 222, and 226 in attestation of the same fact. This assignment was made in November, 1868, and thus ruins appellant's theory that the partnership ended before then.

P. 5. Despite the uncontroverted fact otherwise, appellee persists in the baseless assertion that "*Davis, Sprague & Co.*" kept a bank account with Kountze Bros. only. (See my Brief, pp. 46, 47. Also, Record, pp. 10, 19, 49, 103, 108.)

P. 5. In pp. 60 and 61 of my brief, I averred that the "tie" contract was a colossal political speculation, in which no capital, of consequence, was invested.

My learned friends covertly antagonize this statement by the unqualified assertion that $100,000 was employed by the contractors; and by the statement, inferentially, that appellee invested $\frac{3}{10}$ of that amount in the enterprise.

No basis for these assertions exists except T. C. Durant's statement: "I *suggested* that each tenth owner should put 'up $10,000;' and appellee's statement that he 'furnished *money* for Davis, Sprague & Co.'" (Rec., pp. 66, 60.)

No proof whatever exists, that T. C. Durant's empty *suggestion* was acted on; and no proof exists, that appellee's indefinite contribution of *money* was substantial.

P. 7. The record shows that appellee *was* West after July, 1868. He himself admits that he was West in December, 1868, or the first part of January, 1869, (Record, p. 60.) And he says, more specifically, (on p. 61):

> "About January, 1869, I went out there with a party to go through to Ogden; and, in my own interest, to find out about how our matter stood; and get a statement, if I could, of the million tie contract."

P. 7. The statements that "Durant was not a member of Jas. W. Davis and associates;" also that Davis & Gesner were "the only members of Jas. W. Davis and associates," are not sustained by the evidence.

P. 11. The lack of a replication *in the abstract,* was by common consent, being formal only. This, the counsel well know.

P. 11 and 12. The learned counsel state that "a resume of the facts is to be found in the opinion of the court below." This conclusion is challenged by appellant.

The court below was overburdened with business and could not give the case due consideration; hence its findings of facts were absolutely erroneous. This I have shown in my brief in several places.

P. 12. A perusal of the testimony will not establish the matters of fact, asserted by the learned counsel; but will establish the reverse of each proposition in clauses 1, 2, and 3.

(2.) To the Argument.

P. 18. Unless the remedy at law, shall be *plain, adequate* and *complete*, resort may be had to a Court of Equity.
(Brief p. 20.) Rev. Stat. U. S., sec. 723.

This court will take judicial notice, that had appellant sued at law, he must, by the local law, have made, as part of his declaration, a literal copy of the paper sued on.
Rev. Stat. Ill., ch. 110, sec. 18.

Had he not done so, his suit would have been continued at first term, and dismissed at the second term. (*Ib.*)
(See also), *Hopkins* vs. *Woodward*, 75 Ill., 63.

Had he set out incorrect copies, a plea of *non est factum* would have lain; he must have set out his paper *in haec verba*, and have proven it quite as strictly.

Appellant made *prima facie* proof by Stiger, (Rec. p. 23), that Bell, appellee's solicitor, fraudulently withheld the paper; and Bell, while afterwards on the stand, made no explanation.

This phase of the case is thus commented on: "If an instrument has been destroyed or fraudulently suppressed or

withheld from the party claiming under it, courts of equity will give relief."

Mittords and Tyler's Plead., 209.

The Illinois statute, cited by my learned friends, (at p. 19), does not give the power, impliedly claimed; but, on the contrary, merely authorizes the court to require indemnity, in all cases where paper in suit "was lost *while belonging to the party*," &c.

It might be *lost* after suit brought, as well as before, and in all cases of loss, power is given to the court to require indemnity; not, certainly, power to a suitor to implead lost paper; that power is no greater with than without the statute.

The absolute and specific necessity for this jurisdiction being shown, let me next show that the general practice is not inharmonious therewith.

In Story on Prom. Notes, Sec. 448, it is said that—

> "In America there has been some diversity of judgment, whether a suit is maintainable at law upon a lost bill, against the maker or not. In some States the doctrine has been maintained in the affirmative; in others it has been held in the negative; in others, again, it has been held that the holder is entitled to recover at law, provided he executes a reasonable instrument of indemnity. * * It may be said, with great confidence, that it will be difficult to overturn, upon satisfactory grounds, the reasoning of Lord Tenterden in favor of the negative."

Also, Daniell on Neg. Instr., Sec. 1478.

P. 20. My learned friends are in error in supposing that *Hales* vs. *Holland* bar us out of a Court of Equity; for the Court expressly says that "the remedy thus given to creditors of estates is *ample and complete* in all ordinary cases

(p. 497); also, the complainant * * had a *complete* remedy at law and *no* equitable grounds appear to take the case out of the jurisdiction of the Probate Court." (p. 500).

II.

P. 22. To the extract from Story, adduced by my learned friends, there should be added the following to properly enlighten the Court:

> "But if the loss be sufficiently established, when it is denied by the defendant's answer, the plaintiff will be entitled to relief, although he may have other evidence, competent and sufficient to establish the existence and contents of the instrument of which he might have availed himself in a court of law. For if the jurisdiction once attaches by the loss of the instrument, a Court of Equity will not drive the party to the hazard of a trial at law," etc. (*Ib.*)

P. 23. And to the extract from Greenleaf should be added:

> "What degree of diligence in the search is necessary, it is not easy to define, as each case depends much on its peculiar circumstances; * * in general, the party is expected to show that he has *in good faith* exhausted, *in a reasonable degree*, all the sources of information and means of discovery which the nature of the case *would naturally suggest*, and which were accessible to him." (*Ib.*)

The Court will find these requirements to have been fully complied with: the paper was last seen by complainant, when he gave it to Stiger; and last seen by Stiger in Redfield's office; the latter searched for it there, for complainant. (Rec. p. 21.)

It disappeared from the files, and Stiger inquired of every person in any way connected with the suit, and all disclaimed having it (Rec. p. 21). He applied to the referee, to the

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It disappeared from the files, and Stiger inquired of every person in any way connected with the suit, and all disclaimed having it (Rec. p. 21). He applied to the referee, to the

receiver, to the clerk for the receiver, and to the attorneys on the opposite side, and all disclaimed its custody.

There was no one to serve with a *subpœna duces tecum*, because no one had the paper; nor did the jurisdiction of the court embrace the City of New York, where the paper had disappeared. But if my learned friends shall reply that Bell had the paper, I will rejoin that he was appellee's solicitor; that he had no business with the paper; that his obtaining of it (if he did obtain it) was a moral, if not a technical larceny, which we are not bound to presume; and his withholding it was a repetition of the same crime.

The court will not compel us to assume this; and if it did, then it is a *fraudulent withholding* by appellee, which is sufficient to confer the relief sought.

My learned friends say, in *ex cathedra* style, but without authority, that "the loss must exist at the time of hearing, and not merely at the time of filing the bill; so that if the papers should be produced at the hearing, the jurisdiction of a court of chancery would fail." But the voice of judicial authority, as well as the fitness of things, says that finding of the lost note, after suit brought, will not defeat the jurisdiction.

Crawford vs. *Summers*, 3 J. J. Marsh, Ky., 300;
Miller vs. *Wells*, 5 Mo., 6;
Hamlin vs. *Hamlin*, 3 Jones Eq. (N. C.), 191;
Stir. Eq. Jur., 11 Ed., Sec. 88, *a.* note 3.

The Referee, to whose custody the paper was confided, was called and sworn concerning it (Rec. pp. 41, 42), and disclaimed its possession. The search for it was made by Stiger, and he was examined concerning it, and there was nobody to serve with a *subpœna duces tecum* to produce it, because no one had it.

Nor were our efforts to find it insufficient, by the rule of *McCart* vs. *Wakefield*, referred to by my learned friends (at p. 23 of their brief.)

Court there say the lost paper "was last seen in the plaintiff's office, but *no search* was made for it there," but we did search for it in Redfield's office, and, moreover, examined him under oath about it. (Rec., p. 42.)

From p. 24 to p. 33 of the learned counsel's brief is an astute argument having for its major premise, that I attempted to prove by Bunker the loss of the paper, and having for its minor premise, that when Bunker was about to produce the paper, contrary to my wishes, I suddenly decamped from New York to avoid the sight, and the deduction is, that I absconded from New York "from the fear that it would disclose that which he (I) desired not to find."

This elaborate argument is based on nothing. I had proven the loss of the *paper* by three witnesses of veracity, viz: Rogers, Stiger, and Redfield. I had satisfactory reasons for non-intercourse with the person called Bunker; his ubiquity in the case, however, compelled me to try to get a glimpse of the (not lost paper, but) books of accounts, which were, admittedly, in his custody. I tried this, and failed to get anything; but appellee's success in what I failed in was most marvelous, as will be seen by inspecting the Record at pp. 86 to 95.

But I am at a loss to imagine how my learned friends find that Bunker, even, disclosed a custody of the paper; he certainly does not say he has it; he does not, in his Pandora's box of all that can harm appellant and help appellee, (See Rec., pp. 86 to 95), exhibit these notes; but he does say, (at p. 45), "the lawyers on each side got some of the papers and things:" and our lawyer did not get these notes. (Rec., p. 21.)

My learned friends think I should have subpœnaed Bixby, the receiver. (Brief, p. 31.)

This, the law does not require; I, myself, examined Bixby, (Rec., p. 39), and from him ascertained that he was *not* the custodian of the books. (*Ib.*) And I was not compelled

to put him under oath, to cause him to repeat, under the shadow of the penitentiary, what he had, as a *man*, to my full satisfaction fully advised me about; nor was I then proving anything about the *lost* paper. I note, with surprise, that my learned friends, (at p. 27), accused me of mendacity; and that, with consummate impudence, the special examiner injects in the record, (p. 40), a similar charge.

I can only reiterate my evidence; I did examine Mr. Bixby, as I testified; I did not say, nor is it, in the least degree, inferrable from what I did testify, that I examined him *as a witness*; as my learned friend's clerk, the special examiner, impertinently interpolates in the record, (p. 23.) My learned friends state that the paper was not lost while in appellant's possession, but while in his attorney's possession. I suppose the maxim, "*qui facit per alium, facit per se*," will apply here as elsewhere.

P. 25. If Stiger was awkward in his statements concerning the lost commercial paper, the fact, nevertheless, clearly appears, from the whole context of his evidence, that he spoke, throughout, of the commercial paper in suit, and not merely, of his own files.

P. 26. Nor were there any true and exact copies of them, for Stiger expressly testifies otherwise. (Rec., p. 23.) And appellee does not defeat this *prima facie* case by adducing the copies.

My original position stands firm; but as the court below overslaughed this purely technical point, and decided the case upon the broader and higher ground of its merits, I respectfully solicit the court to review the whole action of the lower court.

III.

Counsel have no basis to support their assertion that we have not established the ownership of the paper, except, possibly, two small pieces. By the adjudged law, we are required to do no more than present ourselves in court, with the paper in our hand.

But, in addition to this completely fulfilled requirement of the law, we prove by both Rogers, (Rec., pp. 10, 11, 15), and by Christopher, (Rec., pp. 50, 51, 52), that the former was the owner.

That this paper was made by the cashier of the firm is a circumstance of credit rather than of suspicion, for he was the appointed officer to do this, and he gives (Rec., p. 52) the reasons why this paper was not paid.

The quotations from T. C. Durant and Bunker unfavorable to our *bona fides* are too indefinite and vague to merit attention as evidence, but are sufficiently specific in their animosity and partizanship to destroy their credit as witnesses. Reference is also shown to the mendacity of T. C. Durant, on pp. 64 and 65 of my brief, and the pertinacious zeal of Bunker, and his answer to what he could not possibly know is too pronounced to leave any value to his evidence, when uncorroborated.

The positive evidence of Rogers and Christopher, *Contra*, is to the fidelity of the following positions, viz:

(1.) That more drafts were made than there was money to provide for.

(2.) That to accommodate the business and the public, Rogers paid other obligations, and held these drafts, expecting money to come to meet them, but which failed to come, and these drafts were not, therefore, paid.

Garbled extracts from stub-books, &c., such as are shown from pp. 40 to 50 of appellee's brief, do not even *tend* to make a case against the integrity of this paper.

If appellee had really wanted the bank books and Rogers' account books, whose lack he deplores, at p. 53 of his brief, there was a legal way of getting them, which he omitted, and he should not now be countenanced in garbling from unauthorized sources, and by strained inferences in destroying the positive evidence of Rogers and Christopher.

If there was anything in their position worthy the attention of the court, the books could have been produced, which would have contained the proof. As appellee chose not to do this, a court certainly will not infer, as against positive proof, what he might have supplied had it existed.

The injection of a defeated indictment against appellant into the record can have no utilitarian purpose, unless it be to insist that because appellant had enemies in Wyoming, he should be emasculated of his rights in this court. The counsel certainly are aware that this indictment is irrelevant, as a direct instrument of evidence, and that having been defeated, it has no legal significance at all. The uncandid and artificial attempt to superimpose a legitimate argument upon it, to give a show of reason for its being there, cannot certainly deceive this court.

But counsel grow bolder, and in the face of the record, which shows that the indictment came to nothing, actually say that appellee *stole* money, &c. Comment is superfluous. The zeal, if not desperation of counsel, outruns their discretion.

But I understand that, while the *personnel* of the debtors was not involved, the ownership of the paper, and the amount due thereon, was involved, and was settled in the New York suit, and is *res judicata*.

IV.

Assuming the exposition of the law of my learned friends (on p. 59 of their brief) to be correct, I do not concede their statements of, and deductions from, the facts to be so; neither Crane, Mattox nor Bunker sustain the positions accorded to them (on p. 60), except by irresponsible hearsay.

Now, as to the *intention* of appellee to be a partner of James W. Davis and associates, or, if you please, to be a partner in the association which furnished the ties beyond the first million: a careful analysis of the evidence will make clear the proposition, or certainly will justify the inference, that his intention was to be a partner in case there were profits to be divided; and if there were no profits, then to not be a partner.

As counsel properly state the law (on p. 61), "Where it is sought to make a person liable, as if he were a partner, evidence must be adduced of his acts; or of what has been done by other people with his knowledge or with his consent."

The delivery of the first million of ties was accomplished in November, 1868 (Rec. p. 56). Appellee had a large interest there, either in the original *plant* or in the immense profits; he was out there, by his own confession, after this, and yet he took no step at all to sunder his connection with this enterprise. T. C. Durant, the brother of appellee, states on oath (Rec. p. 185, appellee's exhibit) that he had "no knowledge or information sufficient to form a belief whether the said Davis has organized or created any new firm or partnership under the name or style of James W. Davis and associates." Now, if appellee did not inform his own brother that he had withdrawn from the firm, the probability is that he did not do so. I am aware that the exigencies of this case compel him to contradict the above, but the evidence, under the pressure of interest, will hardly

displace the disinterested evidence, especially when it is inherent in a document put in evidence by appellee himself.

Again, Mattox testifies that on November 1st, 1868, he settled up the business of the "million-tie" contract. This is denied by Christopher, the cashier of the concern, and by Reed, the chief engineer of the company, and is otherwise grossly improbable; but suppose it was so: if that ended Durant's connection with the *tie* business, why did he not demand a personal, or partnership, settlement?

There was nothing whatever to hinder him from demanding a settlement and division of the profits arising from the delivery of the first million of ties—which profit reached the sum of $225,000 (Record, p. 218)—at any time after November 1st, 1868; and yet he did not demand it till the entire road was completed, two years later. *Then* he did demand a settlement; but as it had been developed that a loss had ensued upon the delivery of ties *after* the first million (Record, p. 82), he then, for the first time, assumed the position now held by him—viz.: that he was a partner during the halcyon days of profits, and a mere spectator during the gloom of disaster. Let not the significant fact be overlooked that his share of profits, on November 1st, 1868, was three-tenths of $225,000, or $67,500.

Appellee is one of the shrewdest business men in the country. The Court will presume that he is endowed with common sense. I ask this plain question: If appellee really intended that his connection with the "tie" business should end when a million had been delivered, why did he not take some intelligent action to end his connection, and to withdraw his share of profits; and, if appellee's counsel be correct, the sum of $30,000, his original investment, or, in round numbers, $100,000; so that on the ground of *intent*, if his acts furnish any criterion, he did, as appears, *intend* to be a partner?

My learned friends desire to know, on p. 68, how I can argue that the firm name was "James W. Davis & Associates," especially when, "after the association was, in fact, formed, the name agreed upon was 'Davis, Sprague & Co.'"

They err in the main premise. No name whatever was agreed upon; the loose statement of T. C. Durant and his brother to that effect finds no support in any act or agreement of the partners; both names were used, indifferently; the first name is that used, throughout, in their dealings with the Union Pacific Railway at all times, and in all their bank accounts, after June, 1868. These latter facts are entirely uncontroverted; not a scrap of evidence exists inharmonious therewith; nay, more, while my learned friends *must* deny this to prevail, the evidence establishing that both names were convertible for the same concern at the same time is *conclusive;* it would be a mockery of logic, if not of common sense, to argue otherwise. Notwithstanding this, my learned friends say that there is "*no* competent evidence in the record, which is not completely overthrown, showing the name of James W. Davis & Associates to have been used before the *Summer* of 1868."

But it is nowhere pretended that the first million of ties were delivered till November 1st, 1868. (Record, p. 56.) And the referee in the New-York suit establishes the time at January 1st, 1869. (Record, p. 218.) And to forever estop my learned friends from denying that the name of James W. Davis & Associates was used while the first million of ties were being delivered, I will cite the following witnesses in attestation of that fact:

Rogers, p. 10.	Sherman, p. 19.
Christopher, p. 49.	Yates, p. 108.
Corlett, p. 110.	Kent, p. 114.
Haygood, p. 116.	Converse, p. 119.
Street, p. 120.	Wild, p. 123.

McLaughlin, p. 130. Glover, p. 132.
O'Brien, p. 133. Van Tassel, p. 156.
James W. Davis, p. 182. S. B. Reed, p. 140.

My learned friends say (p. 76) that Christopher was not the cashier for *Davis, Sprague & Co.* at all, and not for *James W. Davis & Associates* till February, 1869.

This is an evasion of the *substantial truth;* the substantial inquiry is, was Christopher in an official position to know the facts which he testifies about? And Christopher says, plainly, to my learned friends, under the solemnities and responsibilities of his oath, and they make no attempt to either contradict or discredit him: "About the 1st of August, 1868, I went into the office; about two weeks later I was made assistant cashier; had charge of all the cash and cash-books." (Record, p. 48.)

My learned friends err, (p. 85), in attributing to the counsel who signs this brief any hostility to Wild's presenting Roger's books. I never saw Wild, and was never asked to have him present Roger's books.

As my learned friends (from pp. 85 to 93), bestow considerable attention upon the evidence of the business men of Wyoming, where the operations of the association were being carried on, I may observe, that although the business men of a community might be deceived as to the facts testified about for a time, yet that no such error would be suffered to prevail for a series of years; if it was an error, time would correct it. Again, is it not singular that a pronounced change of name, which occurred in November, 1868, should not have been known to T. C. Durant and Sidney Dillon, (the committee charged with building the road?) (See Rec., p. 185,) where they severally say under oath that they "have no knowledge or information sufficient to form a belief, whether the said Davis has organized or created any new firm or partnership under the name or style of James W. Davis and associates."

If my friends' position is true, is it not, likewise, singular that the lawyers of the firm or firms, Steele & Corlett, should suppose there was but one firm under a dual name? And that J. M. Woolworth, their lawyer at Omaha, should be obliged to confess while on the stand, in this case, as appellee's witness, that "it is a very hard question to answer, whether or not, as a matter of fact, Davis, Sprague & Co., and James W. Davis and associates, were different names for precisely the same firm and association of individuals, and for the same business?"

My learned friends do not care to "inquire what became of the sawmill or outfit of Davis, Sprague & Co. when they completed the million tie contract?" (Brief, p, 97.) But their client owned three-tenths of them, and if their theory be correct, he was through, and had no further use for them; if my theory be correct, he would have acted, just as he is shown to have done, remain quiescent, and let the business progress; but if their theory be correct, he certainly needs a guardian, for no man of sense would have allowed a large fortune in destructible property, cattle, saw mills, logging wagons, camp equipage, &c., to be consecrated to total destruction through years of use in the forests. Words may be lightly spoken; men's evidence under pressure is oftentimes false; but acts, prompted by self interest, are logical and consistent with the order of the universe, and to say that W. F. Durant's interest in this "tie" business terminated on November 1, 1868, while he left his property in Wyoming, in the hands of Davis and Sprague to be used up and destroyed, is to proclaim him to be a fool; and to say the same of the other partners, is to affirm the same thing of them; and to further say, that these partners left $225,000 of accumulated profits in the hands of Davis and Gesner, for the sole use of the two latter, is to doubly indict them for the crimes of imbecility and improvidence. T. C. Durant was monarch of all he surveyed, in this enter-

prise. Would he, too, have allowed his brothers vast property to be destroyed in this manner, if appellee's theory be true?

My position as to the nomenclature of the firm (Brief, p. 98) is, not that Davis was inhibited by law or otherwise from calling Gesner his "*associates*," but that it was extremely improbable that he should do so, especially where he had in a grave business document (Record, p. 202), on January 8th, 1868, declared that the organization which executed the "million-tie" contract was called "*the firm of James W. Davis & Associates.*" This was the document which made Gesner a partner; and it conferred on him only one-twentieth interest. It bears date January 8th, 1868; and it is entirely out of harmony with chronology and probability to assume (as counsel must do) that ten months later, Davis formed "the firm of James W. Davis & 'associates,'" by conferring on the same Gesner one-half interest, and excluding all other of the partners.

The analysis of evidence submitted by my learned friends (pp. 99, 100, 101) is certainly not sustained by the evidence.

As to the first claim made, I respectfully submit that it is apparent from the evidence (and there is so much of it as to need no special mention) that, while no name was adopted, business was done from the start in both names; and the following item of the Referee's report (Record, p. 204), viz.: "In the execution of said million-tie contract, all sub-contracts for making or delivering ties, purchases of goods, merchandise and materials, payments to employees for labor, and receipts given for work, labor and materials, were made, done, and given sometimes under the style of Davis, Sprague & Co., and sometimes that of J. W. Davis & Associates."

To the second point should be added the following words: "And afterwards" (Record, 153, 157.)

As to the third point: It may be admitted that Rogers

dealt with them by both names, for such fact is also clearly established. If appellee means to claim that Rogers dealt with them in no other name, he is grossly mistaken.

As to the fourth point: It is almost absurd to make the claim there set forth.

The contrary is expressly established by the two men who must have known:

Christopher, Rec. p. 49.
Reed, Rec. p. 140.

And the referee in the New York suit found that

> "The accounts kept by said trustees with said associates for work done, materials furnished under said several contracts, as well east as west of Elk mountain, were kept in the name of J. W. Davis and associates, and payments for such work and materials were made by said trustees by checks or drafts running in the name of the said J. W. Davis and associates." p. 204.

As to the fifth point, it is not sustained; but the contrary thereof is by the proofs:

Reed, Rec. p. 139;
Rogers, Rec. p. 11;
Sherman, Rec. p. 20;
Christopher, Rec. p. 50;
Van Tassell, Rec, p. 156;
All the Wyoming business men.

And T. C. Durant and Sidney Dillon severally swear that—

> "Davis offered and proposed, on behalf of himself and his partners or associates, to sell and deliver to these defendants * * ties and lumber; * * that these defendants accepted said proposal, etc." (Rec. p. 84).

And appellee was in consultation with Davis about this case, but did not deem it well to examine him as a witness.

We have answered the sixth point elsewhere. We need only repeat that, if true, it amounts only to an empty declaration of an intention to do a thing, which was not, however, acted on; and, consequently, was abandoned before the time came for action.

The seventh point should not have been attempted; it discredits everything else. So far is it from being established, that it plainly appears by uncontroverted proof that Sprague was in charge of the extreme western part of the enterprise to the end.

Hear Van Tassell (Rec. pp. 156, 157):

> "I was sent to Bear River by M. B. Sprague with the understanding and direction from him that James W. Davis was trying to make a separate firm, but that he, Sprague, would come up himself. Afterwards he came up, and was in charge the same as when with M. B. Sprague and Davis, Sprague & Co."

And the evidence referred to in support will be found to be hearsay and unauthorized opinions; the practical fact is, that Sprague remained in the combination to the end.

The eighth point is not sustained by either Davis or Gesner; hearsay is not evidence, and appellee, though receiving confidential letters for use in the case from Davis, did not deem it prudent to put either him or Gesner on the stand.

As to the ninth point, counsel is mistaken; Durant did not *always* tell Rogers he was not a member of the firm; contrariwise, he was introduced to Rogers and made no dissent therefrom as a member of the firm, by Mattot; and neither Durant nor Mattox, though both were afterwards on the stand, denied it.

In 1870, after the New York suit had been commenced, and after Rogers had owned the paper for a year, he declared he was not a member; but he never made this declaration when it would have warned or protected Rogers.

Finally, counsel say (p. 101) that no express assent to the acts of Jas. W. Davis & Associates, by Durant, is shown, and none can be inferred from his ignorance; and no contract is shown constituting him a partner. This is not sound; tacit consent is as binding in this case as express assent. Davis & Sprague are shown throughout to have been managing partners. Appellant became a partner by accepting $\frac{3}{10}$ths of the contract; his ignorance of what was going on was no excuse; his acceptance of a share in the contract made him a partner.

V.

Counsel state (p. 105) that there is *no evidence* that, when this order (of November 11) was made, the main issue had been testified about. But Bunker says (pp. 81, 82):

> "There was a fight *between the members of Davis, Sprague & Co.* and *Jas. W. Davis & Associates.* The first firm claimed that the last owed them a large amount of money. Davis & Gesner claimed that the firms were the same in fact; * * * this issue was testified about *early in the case*, and was prominent. THEN, (that is, after the main issue had been testified about,) an order was made to bring in creditors," &c.

And the referee testifies (Rec., p. 43):

> "I think the main issue in this case was *substantially tried* before the question of the rights of the different creditors was entered on."

As one of the cardinal rights of a suitor, whom it is sought to bind by an estoppel, is the right "*to cross-examine the witnesses adduced on the other side*," (Green on Ev., Sec. 523,) how can this party be bound by an issue which had been testified about *early in the case*, and before the order of November 11th? He certainly could not cross-examine the witnesses; and he is not bound by the cross-examination of any other suitor.

My learned friends say that—

> "There were informalities * * * in the New York proceeding. It might have been the better practice to have required Mr. Rogers to be made a party to the suit—to have filed his formal plea of intervention; but the court, counsel on both sides, and Rogers himself, seem to have waived the technical rules, and he filed his claims merely with affidavits attached." (p. 107.)

Counsel is in error; the order to those having claims was to "present the same, together with their proofs, in support of the validity thereof." Rogers did just this fully, and no more. (Rec., p. 21.) He could do no more; his authority was limited by the order; but he waived nothing.

Christopher tried to be made a party so that he could control the proceedings, but this was denied. (Record, pp. 46, 47, 168, 169, 170, 51.)

> "No written pleadings were filed, or sought to be filed, by any claimant, except a verified statement of their claims." (Ev. of the Referee, Record, p. 41.)

And this was all that was allowed by the order.

Counsel say (p. 107) "it is too late" for us to now object to any irregularity; that we should have appealed, &c. My reply is that our only appeal would have been from an order affecting the ownership or "*validity*" of our claims; for no other issues were tendered to us.

Counsel say (p. 108): "An intervener, though not named in the pleadings which present the original, or main, issues, is still a party to the cause; and any decree affecting him can be reviewed, on appeal;" and that there was an appeal on Bunker's claim.

(Bunker merely says: "They had an appeal in my case, at one time") (Record, p. 46.)

My reply is, that claimants were not parties to anything

except the ownership and validity of their claims; from any issue arising from those limited inquiries, perhaps they might appeal. Doubtless, the appeal from Bunker's claim, if there was any such, was in one of those limited issues; but it is entirely out of place to say that any appeal lay, at the behest of claimants, concerning the *main issue* which had been substantially tried, when the order to bring them in at all was made.

My learned friends say that the claimants did take part in the main issue (pp. 108, 109). The question, however, is, not what was irregularly done, but what was *authorized* to be done. What might claimants do within the record? Were they *parties?* or were they merely stipendiaries of a *fund*, that was being litigated about between rival and hostile parties? And all parties agree that Rogers did only what the order authorized. (Record, pp. 21, 36, 82, 85.)

It appears that some of the claimants were examined as to the main issues "*as witnesses;*" but that could not bind them as *parties*.

The learned counsel say (p. 114) that by "taking the money of Jas. W. Davis & Associates with full knowledge, he is concluded from claiming that he was not entitled to it; but was entitled to another fund—to wit: that belonging to Davis, Sprague & Co."

This is hardly intelligible. Appellee does not claim from any other *fund*. The terms of the order of November 11 were clear. He should participate in a fund, if he came in. He did come in, and did participate in a fund. He makes no complaint of the distribution of the *fund;* but he now sues, *in personam*, for his debt. And the only effect of taking 15 per cent. is, to diminish his claim to that extent. It is, in fact, a payment *pro tanto*.

My learned friends rely very much upon the case of *Newcomb* vs. *St. Peter's Church*, 2d Sand. Chy., 636 (pp. 114, 116).

This case cannot be understood from citing one of the *dicta* of the court. The case was thus: M. R., died in 1811, having made a will in 1802. By the will he bequeathed 20 shares of Manhattan Company stock to S. P. C. Before his death he had sold the stock, and it was thus, in law, addeemed probably; yet his executors paid to S. P. C. the par value of the stock in money. Afterwards, M. M., a sister of the testator, filed her bill against the executors for an accounting, and for her share; in the accounting the executors debited the estate the amount paid to S. P. C., in lieu of the stock; and M. M. took the amount awarded to her by the decree. Afterwards, B. B., another sister of the testator, filed her bill against the surviving executor for an accounting, basing her bill upon her sister's decree; for which her administrators were afterwards substituted, (she having died meanwhile) and a decree was obtained, which was settled by the payment of money to said administrator—the validity of the debit of the amount paid by the executor in lieu of the stock not being raised in either case. Afterwards, the heirs of the two sisters filed a bill to carry the former decree into effect by the sale of some real estate, which remained unsold; and it was done accordingly. Then, after all these things, new letters of administration *de bonis non* were taken out on the estates of the sisters, and the executor of the original testator was sued by the new administrators for the money paid to S. P. C., in lieu of the Manhattan Company stock. The court held that this inquiry was *res judicata* by the former adjudications.

So it merely decided that, where parties filed a bill for an accounting, that they were bound by such accounting and every item thereof; and that once having an accounting, which they abided by, they could not file another bill to dispute, and have a new accounting upon some of the items embraced in the account. That does not touch the question involved here.

In that case, Bridget O'Brien, the second sister, was only bound by the accounting, and not by any collateral inquiries. Here, we admit ourselves bound by the amount found due, and the validity of our claims; but not as to matters litigated about between the tie contractors, which was not even alluded to in the order under which we acted, or in the proofs we were allowed to make, (Rec. p. 51.)

My learned friends say (p. 118) that a material question in the New York suit was, "by whom was the amount owing?" and that within this question was involved the liability of their client; and they aid the court in its functions by informing it what three lawyers think about it. My reply is, that the order provides that claimants against the *firm* of "J. W. Davis and associates," and claimants against the *firm* of "Davis, Sprague & Co.," should present the same, together with proofs of the validity thereof, and the question of what *firm* owed us was apparent upon the face of the paper.

Estoppels are declared to be odious by our most ancient and highest authorities, and courts are uniformly hostile to enlarging their scope, authority or force, and they are confined now, as they were when the Duchess of Kingston's case was considered, to the closest, most narrowly confined, and most rigidly technical limits.

VI.

Upon several pages, from p. 122 forward, my learned friends assume that Durant was a member of Davis, Sprague & Co., and not of the other firm; but the proof establishes that the two names were but synonyms for the same firm; hence, their labored reasoning fails.

At p. 126, my learned friends say "there had been a limited undertaking to get a million ties, completed long before this paper in suit was made," &c.

But, not only did Rogers not know when one million ties had been delivered, but as the same firm and the same management kept on, beyond the delivery of a million, he was justified in supposing that the personnel and identity of the original firm was the same.

My learned friends quote from Lindley, that "*the alteration of checks*," &c., is notice. (p. 126.)

The converse is true; if the *alteration* is notice of a change, the non-alteration is proof of homogeneity, and from June 22d, 1868, till the road was all tied, every single check was signed "J. W. Davis & Associates:" and this is undisputed and intraversable.

My learned friends say (p. 127) that the authoritative statute of Wyoming (cited in my brief at p. 94), requiring specific notice to be given, in order to exonerate a retiring partner, has no application, because "the partnership was "*formed* in Nebraska." But this reason, while unsound, at best, has no possible application here, where the attempt is to escape from a responsibilty existing in Wyoming. The statute states how this may be done, and, *expressio unius est exclusio alterius*. It has no reference at all to the contract of partnership, but to his acts. Did he withdraw from this firm? That is an act to be legally performed in a mode prescribed by the statute. Did he do it? He did not; then he remains bound.

This, at least, *is* clear and likewise conclusive.

VII.

P. 141. Rogers did not present his claims till the spring of 1871. (Rec. p. 21.)

P. 142. Counsel say:

> "If Rogers had a cause of action, then (N. Y. suit) he should have presented the whole of his evidence

> on that trial. He will not be allowed to claim that Durant was a partner, and was liable for one reason there; and, when the court finds against him, claim him liable for another reason here."

This is extremely flimsy.

If my learned friends will look at the terms of the order of Nov. 11, they will see the exact license under which we acted; to have attempted to show *who* were the partners even as between themselves, and, especially, to show who held themselves out to us as partners, would have been stopped at once.

Rogers did present his entire evidence against the *fund;* he was not seeking, nor allowed to seek, any personal redress against Durant or anybody else; hence, he was not allowed to, and did not, in fact, offer any evidence against Durant, or any other person.

The issue: does Durant owe, either by virtue of being a partner, or by reason of holding himself out as a partner, was never made at all, and we could not take issue on it.

Nor did we claim that Durant was a partner then; not at all. But we merely claimed that the *institution* of J. W. Davis and associates, as an *institution*, and utterly regardless of its component parts, internal police, *alias* names, or business methods, was liable to us for twenty pieces of paper, bearing the name of the *institution* thereon.

The only questions put to us, were:

1. Have you paper with that firm's name thereon?
2. Are you the owner?
3. Is the paper *valid*?
4. What is the sum total?

These were the only questions submitted to us; and these were the only questions which could bind us; if there were other questions, they were either, so far as we were concerned:

1. Entirely unauthorized and *ultra vires;*
2. Collateral or incidental;
3. Matters of evidence to prove the points *directly in issue;*
4. Or, matters to be inferred from the judgment.

And by none such are we bound.

Counsel cite what Redfield says was allowed to be proven in the N. Y. suit, (p. 142.) Gillet, Stiger, and Christopher deny this, and they are probably correct; but, if this sort of evidence was allowed under the order of November 11 it was unauthorized, and certainly can bind no one, as an estoppel.

Redfield himself apologizes for it in this way (Record, p 42): "The reference was not conducted in accordance with very strict principles of law as to admission of evidence."

Finally, I admit that, as to all questions concerning the *fund* in the New-York suit, Rogers is bound as an estoppel; not having appealed from the distribution of the *fund*, he is bound by that distribution. He can never claim in any court that he has a right to the *fund* adjudged to belong to Davis, Sprague & Co.; nor can he deny that the accounting, as found by the referee, is conclusive; for he submitted the question as to the amount, nor can any other adverse party or privy contest this, for estoppels are mutual. He cannot even deny that the *firm* of Jas. W. Davis & Associates owe this debt; but the inquiry went no further. It did not decide, as between complainant and Durant, who were the members of James W. Davis & Associates; it did not embrace or consider whether he held himself out to complainant as a member of that firm.

Hence, these inquiries are untrammelled in this suit, and the latter issue, at least, is proven absolutely against the appellant.

VIII.

My learned friends say (p. 148) that Rogers purchased this paper, after dishonor.

In this statement they probably err; but if true, what? The payees could recover on the showing made, and appellant has certainly no less rights.

They further say (Ib.) "his alleged purchase was merely a speculation in some *stale* claims, which he did not bring forward for years, etc."

Mark, how plain a tale shall put this down? The paper was *all* dated between April 12, 1869, and February 21, 1870.

The obligors concluded their contract at about the time the last paper was made and left the Territory.

Expectations were had, from time to time, of voluntary payment, which were not realized, and in the spring of 1871, appellant brought them forward for a participation in the fund; about one year elapsed before his action; not a single claim was two years old when enforced collection was attempted.

Appellant asks now, with greater confidence than before that the finding of the lower court be reversed, and a decree ordered in substantial accordance with the prayer of the bill.

HENRY C. WHITNEY.
Solicitor for Appellant.